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09/548,203	04/13/2000	Theodore M. Osborne	1389	6649

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DALY, CROWLEY & MOFFORD, LLP  
SUITE 101  
275 TURNPIKE STREET  
CANTON, MA 02021-2310

EXAMINER

STEELMAN, MARY J

ART UNIT	PAPER NUMBER
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2122

23

DATE MAILED: 03/23/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

124

## Office Action Summary

Application No.

09/548,203

Applicant(s)

OSBORNE ET AL.

Examiner

Mary J. Steelman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 1/20/04, 2/20/04, 3/2/04.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>20,21,22</u> . | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1. This action is in response to Amendment D filed 01/20/2004.
2. As per Applicant request, claims 13, 15-18, 20-32, and 34-35 are cancelled. Claims 1-12 are pending.
3. Applicant has sworn behind the filing date of the Underwood reference, U.S. Patent 6,523,027.

### ***Information Disclosure Statement***

4. IDS received 2/20/2004 and 03/02/2004 has been considered.

### ***Specification***

5. All related applications and patents must be cross-referenced in the Specification.

### ***Double Patenting***

6. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

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7. Claims 1 and 3 are provisionally rejected under the judicially created doctrine of double patenting over claims 22 and 4, respectively of copending Application No.09 / 482178. This is a provisional double patenting rejection since the conflicting claims have not yet been patented.

The subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows: The correspondence between the instant claims and the copending Application claims is as follows:

**Application 09/548203 Claim 1 compared to Application 09/482178 Claim 22:**

A system for determining performance of an application under test in response to load, the system comprising...

Identical claim except claim 1, '203 is for a server having at least one JVM executing client test code, whereas claim 22, '178 is for a server having a plurality of threads thereon...

Specifically a JVM is capable of running a plurality of threads and thus the claims are a case of obvious double patenting.

**Application 09/548203, Claim 3 compared to Application 09/482178, Claim 4:**

Claim 3, '203 states at least one JVM is synchronized to start execution...with another ...JVM, whereas claim 4, '178 states "the step of synchronizing comprises starting each instance of test code at the same time.

Specifically, both claims are referring to a synchronized start of execution.

8. In reference to co-pending application 09 / 482178, it is noted that Applicant agreed in Amendment A, filed 01/02/2003, to file a terminal disclaimer, upon an indication of allowance.

***Claim Rejections - 35 USC § 103***

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. **Claims 1-12** are rejected under 35 U.S.C. 103(a) as being anticipated by U.S. Patent 6,446,120 to Dantressangle, in view of U.S. Patent 6,510,402 to Logan et al.

Dantressangle disclosed a client computer that acts as one or more virtual users executing a test script to stress a server. Dantressangle disclosed:

**Per claim 1:**

-coordination software. (Dantressangle: Fig 5 & col. 7, lines 3-6, "...steps performed by the stresser main process 400 of the configurable stresser 200 to stress a Web server 104...");

-at least one code generator, receiving as an input commands from the coordination software and having as an output client test code. (Dantressangle: Fig. 4 & col. 5, lines 66-67, "Initially, a user generates a test guide file 402 that contains the instructions for testing the Web server 104.");

-at least one test engine, receiving as an input commands from the coordination software;

(Dantressangle: Col. 5, lines 26-35, "The configurable stresser 200 measures the accessibility and the responsiveness of a Web server while heavily loaded...the configurable stresser 200

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provides a JAVA Applet GUI. This will allow a user to launch a very long stress test from a Web browser...”);

-at least one data log having computerized memory, the memory holding timing data created by the instances of the client test code. (Dantressangle: Col. 6, lines 22-25, “Each virtual Web browser 404 executes the structure representing the test guide file 402 and generates a result file 406 (log)”);

Dantressangle did not provide extensive details concerning the testing of application components on the server. However, Logan did disclose more details regarding component testing in an integrated test environment network (Col. 2, lines 20-21). Specifically, (col. 2, lines 42-47) “The testing tools include facilities for: developing and executing suites of related test cases, developing and executing testing checklists, documenting and tracking software defects discovered in the course of testing, help files and other documentation defining the testing standards, methods and procedures and centralized reporting facilities.” At col. 7, lines 2-7, Logan disclosed regression testing and at col. 8, lines 14-29, Logan disclosed “three major types of tests: background automated tests, interactive automated tests, and automatic checklist processing to support manual testing activities...” Logan disclosed (col. 7, lines 27-29), “When testing components, e.g., JAVABEANS, each executable class within the component must be tested.” Logan disclosed:

-the test engine comprising a computer server having at least one software implementation of a processor executing at least one instance of the client test code. (See Logan, Abstract, lines 3-6, “retrieving one or more test suites and associated platform partitions from at least one server system to initiate component testing.” Also col. 2, lines 6-10, “given the large number of run

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environments for JAVABeans having a dedicated machine for each JAVA runtime environment to ensure the same base environment increases the hardware costs...” Col. 2, lines 32-34, “innovative use of partition images ensures the integrity of test environments without requiring a concomitant expense of having multiple dedicated machines for each platform...” Col. 3, lines 17-22, “the present invention is described in terms of an environment utilizing the capabilities of JAVA programming...” Col. 3, lines 42-46, “The partition build machine is utilized to create and warehouse compressed partition images...” Platform / partition images are used as a “software implementation of a processor executing at least one instance of the client test code.” Obviously, when testing JAVA programming a virtual machine (software implementation of a processor) is running.

-at least one data analyzer software, operatively connected to the data log, having an output that represents performance of the software component of the application under test in response to load. (Logan: Col. 8, lines 36-36, “...generates the test results...passes to the server ...to be posted...” Logan disclosed testing software components (Abstract, line 1.))

Therefore, it would have been obvious, to one of ordinary skill in the art, at the time of the invention, to have modified stress testing software on a server, as disclosed by Dantressangle, by specifically including component testing, and including “at least one software implementation of a processor executing at least one instance of the client test code”, as disclosed by Logan, because load, stress and performance testing of a server, including the components of an application located on the server, ensures that the system response time and communication links are adequate and that each component of an application is behaving as expected. Furthermore, by using an implementation of processor a virtual machine can execute byte code.

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**Per claim 2:**

-at least one software implementation of a processor executes multiple threads, each thread comprising an instance of the client test code. (Dantressangle: Col. 6, lines 1-4, "When launched a stresser main process of the configurable stresser will generate a requested number of virtual Web browsers (i.e. "child processes").")

**Per claim 3:**

-at least one software implementation of a processor is synchronized to start execution of an instance of the client test code with another of said at least one software implementation of a processor about to start execution an instance of the client test code. (Dantressangle: Col. 6, lines 4-14, "A user indicates the number of virtual Web browsers to be generated when launching the configurable stresser...The configurable stresser can simulate many virtual Web browsers, each of which connects and sends HTTP requests to the same Web Server...many connections and HTTP requests at the same time.")

**Per claim 4:**

-synchronization of at least one software implementation of a processor to another of said at least one software implementation of a processor is performed independently of the time set on each system. (Dantressangle: Col. 6, lines 31-34, "The Web server can receive the same or different commands from the different virtual Web browsers simultaneously.")

**Per claim 5:**

-at least one software implementation of a processor is set to start execution of the client test code a predetermined time after another of said at least one software implementation of a processor is set to start execution of the test client code. (Dantressangle: Col. 6, lines 31-34,



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“The Web server can receive the same or different commands from the different virtual Web browsers simultaneously.”)

**Per claim 6:**

-at least one software implementation of a processor is set to start execution of the client test code independent of another of said at least one software implementation of a processor set to start execution of the client test code. (Dantressangle: Col. 6, lines 31-34, “The Web server can receive the same or different commands from the different virtual Web browsers simultaneously.”)

**Per claim 7:**

This is a computer program product version of the limitations as addressed in claim 1.

Therefore, claim 7 is rejected under the same rational as claim 1.

**Per claim 8:**

Claim 8 contains limitations as recited in claim 2. Therefore, claim 8 is rejected under the same rational as claim 2.

**Per claim 9:**

Claim 9 contains limitations as recited in claim 3. Therefore, claim 9 is rejected under the same rational as claim 3.

**Per claim 10:**

Claim 10 contains limitations as recited in claim 4. Therefore, claim 10 is rejected under the same rational as claim 4.

**Per claim 11:**

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Claim 11 contains limitations as recited in claim 5. Therefore, claim 11 is rejected under the same rational as claim 5.

**Per claim 12:**

Claim 12 contains limitations as recited in claim 6. Therefore, claim 12 is rejected under the same rational as claim 6.

***Response to Arguments***

11. Applicant's arguments filed 01/20/2004 have been fully considered but they are not persuasive.

Applicant has argued, in substance, the following:

(A) Neither Dantressangle nor Logan disclose a "software implementation of a processor executing at least one instance of the client test code."

**Examiner's Response:**

See Logan, Abstract, lines 3-6, "retrieving one or more test suites and associated platform partitions from at least one server system to initiate component testing." Also col. 2, lines 6-10, "given the large number of run environments for JAVABeans having a dedicated machine for each JAVA runtime environment to ensure the same base environment increases the hardware costs..." Col. 2, lines 32-34, "innovative use of partition images ensures the integrity of test environments without requiring a concomitant expense of having multiple dedicated machines for each platform..." Col. 3, lines 17-22, "the present invention is described in terms of an environment utilizing the capabilities of JAVA programming..." Col. 3, lines 42-46, "The partition build machine is utilized to create and warehouse compressed partition images..."

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Platform / partition images are used as a “software implementation of a processor executing at least one instance of the client test code.” Obviously if testing JAVA programming a virtual machine (software implementation of a processor) is running.

***Conclusion***

12. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

13. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mary Steelman, whose telephone number is (703) 305-4564. The examiner can normally be reached Monday through Thursday, from 7:00 A.M. to 5:30 P.M. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tuan Dam can be reached on (703) 305-4552.

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The fax phone number is (703) 872-9306 for regular communications and for After Final communications. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 305-3900.

Mary Steelman

03/10/2004



**TUAN DAM**  
**SUPERVISORY PATENT EXAMINER**